

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BARJINDER SINGH, et al.,
11

Plaintiffs,

v.

12 FEDERAL NATIONAL MORTGAGE
ASSOCIATION, et al.,

13 Defendants.
14

CASE NO. C13-1125RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Defendants' motion to dismiss. No party requested oral argument, and the court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS the motion. Dkt. # 22. Plaintiffs have not requested leave to amend their complaint, and the court concludes that Plaintiffs would not state viable claims even if the court granted leave to amend. The court accordingly DISMISSES this action with prejudice, and directs the clerk to enter judgment for Defendants.

II. BACKGROUND

The court last considered this dispute when it dismissed Plaintiffs' original complaint in a February 7, 2014 order. In that order, the court explained why the original complaint stated no viable claims, but granted Plaintiffs leave to amend. Plaintiffs responded with an amended complaint that addressed very few of the issues that led the

1 court to dismiss their original complaint. Its principal changes were additional
2 allegations regarding whether Defendant Bank of America, N.A. (“BofA”) or Defendant
3 Federal National Mortgage Association (“Fannie Mae”) was the holder of the promissory
4 note at the core of this dispute, and a few new allegations regarding the damages
5 Plaintiffs allegedly incurred as a result of Defendants’ wrongdoing. These new
6 allegations do not salvage Plaintiffs’ suit.

7 The court briefly revisits the allegations of Plaintiffs Barjinder Singh and
8 Ramandeep Kaur, a brother and sister who once lived (along with other family members)
9 in a home in Kent. They took out two loans (the court will refer to them as a single loan,
10 for simplicity) from BofA in 2007. BofA secured the note evidencing the loan with a
11 deed of trust. There is no dispute that by late October 2010, Plaintiffs had defaulted on
12 the loan. There are no allegations in the complaint that Plaintiffs could have cured that
13 default.

14 Plaintiffs did, however, attempt to obtain a modified loan that they could afford.
15 To that end they turned to either BofA or its subsidiary, BAC Home Loan Servicing, LP
16 (“BAC”) to request a modification. Because none of Plaintiffs’ claims require the court
17 to distinguish between BofA and BAC, the court will generally not make any distinction.
18 The amended complaint is silent as to when Plaintiffs first requested a modified loan, but
19 it admits that in March 2011, they received notice from BofA that they lacked sufficient
20 income to warrant a modification.

21 By March 2011, there is no dispute that Plaintiffs also knew they faced
22 foreclosure. They do not dispute that they received a notice of default in late 2010, and
23 they do not dispute that by February 2011, they received a notice of a trustee’s sale
24 scheduled for May 6, 2011. The trustee who issued that notice was Defendant
25 ReconTrust, N.A.

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1 Despite BofA's initial rejection of their request for a modified loan, Plaintiffs
2 believed that BofA had failed to consider all of their household income, and that if it did
3 so, it would modify the loan. There are no plausible allegations that anyone had an
4 obligation to modify Plaintiffs' loan, regardless of their household income. And there are
5 no plausible allegations that any Defendant promised them a modified loan. Instead,
6 BofA "dual tracked" Plaintiffs, which is to say that it purported to consider Plaintiffs'
7 renewed request for a loan modification while assuring Plaintiffs that the May 6, 2011
8 trustee sale would not occur until BofA made a decision about the modification. Those
9 promises did not, however, result in ReconTrust taking any action to postpone the sale.
10 With just a few days before the sale, and with no decision from BofA on their
11 modification request, Plaintiffs brought in a third party to help them cut BofA's red tape
12 and (around May 4) they began attempting to contact ReconTrust directly. They had no
13 success even reaching anyone at ReconTrust, although the notice of trustee's sale
14 provided a toll-free contact number.

15 The trustee's sale occurred as scheduled on May 6, 2011. By May 10, Plaintiffs
16 admit that BofA finally communicated that it would not modify their loan, and it declined
17 to rescind the trustee's sale. It was Fannie Mae who bought Plaintiffs' property at the
18 trustee sale. Plaintiffs do not admit as much, but they admit that Fannie Mae later evicted
19 them from the property.

20 From these allegations, Plaintiffs attempt to state three claims. They claim that
21 every Defendant has violated the Washington Consumer Protection Act ("CPA") and is
22 liable for either intentional or negligent misrepresentations. They contend that
23 ReconTrust violated the Washington Deed of Trust Act. These are the same claims
24 Plaintiffs raised in their original complaint, which the February 7 order dismissed in its
25 entirety via Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.
26 Incorporating by reference the court's discussion of the standards applicable to a Rule
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12(b)(6) motion from the February 7 order, as well as the court’s analysis of Plaintiffs’
 2 original complaint, the court explains why Plaintiffs’ amended complaint fares no better.

3 III. ANALYSIS

4 A. Plaintiffs Do Not Succeed By Restating Rejected Claims From Their Original 5 Complaint.

6 Although the court instructed them not to, Plaintiffs used their amended complaint
 7 to restate many of the claims that the court rejected in February. The claims fare no
 8 better this time around, particularly because Plaintiffs offered no new argument to
 9 support them. The court briefly considers each of these rerun arguments.

10 Plaintiffs reassert, without citing any new authority, that ReconTrust violated a
 11 requirement of the Deed of Trust Act (RCW 61.24.030(6)) by failing to maintain a
 12 physical presence in Washington. The court need not reiterate its disagreement with that
 13 position. Rather than new argument, Plaintiffs used their amended complaint (and
 14 response to the motion to dismiss) to announce that they disagreed with the court. They
 15 are free to do so, of course, but the proper way to disagree with the court is to either file a
 16 motion for reconsideration¹ or appeal. Plaintiffs’ choice to simply reassert arguments
 17 that the court rejected is not acceptable advocacy.

18 Plaintiffs reassert, without citing any new authority, that they have a claim based
 19 on their concerns about the notarization of the document appointing ReconTrust as a
 20 trustee and the document conveying their deed of trust to Fannie Mae. Improprieties in
 21 notarization can give rise to a CPA claim or claim for violation of the Deed of Trust act,
 22 but only where the impropriety is used to evade the law. For example, in *Klem v. Wash.
 23 Mut. Bank*, 295 P.3d 1179, 1182 (Wash. 2013), the court considered a notice of a
 24 trustee’s sale that was notarized *before* the trustee signed it. The court held that “false

25 ¹ A motion for reconsideration must come within fourteen days of the ruling it challenges, and
 26 must demonstrate either “manifest error in the prior ruling” or “new facts or legal authority [that]
 27 could not have been brought to [the court’s] attention earlier with reasonable diligence.” Local
 Rules W.D. Wash. LCR 7(h)(1), (2). Plaintiffs neither timely moved for reconsideration nor met
 the standard applicable to that motion.

1 dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or
2 deceptive act or practice” within the meaning of the CPA. *Id.* at 1192. It also held that a
3 plaintiff could plausibly claim damages arising from that practice, where “the purpose of
4 predicated notarizations was to expedite the date of sale to please the beneficiary,” and the
5 plaintiff might have avoided the sale if it had occurred even a week later. *Id.* Here, by
6 contrast, Plaintiffs allege no “false” notarization, they point out that certain documents
7 were notarized *after* they were signed. There is no plausible allegation that this practice
8 is false, unlawful, or that it made any difference at all in the timing of their foreclosure.

9 Plaintiffs reassert, without citing any new authority, that they have a claim because
10 ReconTrust is a subsidiary of BofA. The court already pointed out that no law prohibits
11 this arrangement, and that courts have allowed trustees with cozy relationships with a
12 deed of trust beneficiary. Feb. 7 ord. at 7-8. Recent case law emphasizes that a trustee
13 owes duties to both the borrower and the beneficiary of a deed of trust, and that a trustee
14 who the lender controls or who invariably defers to the lender has violated that duty. *See,*
15 *e.g., Klem*, 295 P.3d at 1190 (holding that “the practice of a trustee in a nonjudicial
16 foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby
17 failing to exercise its independent discretion as an impartial third party” is an unfair or
18 deceptive practice under the CPA). Here, however, there are no plausible allegations that
19 ReconTrust was beholden to BofA. Indeed, it was BofA who allegedly told Plaintiffs
20 that the trustee’s sale would be postponed pending a decision on the loan modification,
21 whereas ReconTrust simply ignored Plaintiffs’ attempts to postpone the sale. If
22 ReconTrust acted unlawfully, there are no plausible allegations that it did so because it
23 was beholden to BofA.

24 Plaintiffs reassert, without citing any new authority, that the BofA or ReconTrust
25 employees who signed some critical documents were actually employees of ReconTrust,
26 or BofA. The court rejected that argument in February, noting that if someone at

1 ReconTrust or BofA acted without the authority of the corporate entity he or she
 2 purported to represent, that was a problem impacting only the Defendants. Plaintiffs
 3 have no standing to raise a dispute based on who at ReconTrust BofA authorized to sign
 4 certain documents. So, for example, when Plaintiffs insist that Leticia Quintana, the
 5 purported “Assistant Secretary” of BofA who signed the document appointing
 6 ReconTrust as a successor trustee was not actually an Assistant Secretary of BofA, but
 7 rather an employee of ReconTrust, the allegation makes no difference. BofA is
 8 responsible for deciding who may take actions on its behalf, not Plaintiffs.

9 Plaintiffs reassert, verbatim, the same cursory allegations that either BofA or
 10 ReconTrust misrepresented their past due loan balance and inflated fees associated with
 11 their default. The court rejected those allegations as conclusory in February, noting the
 12 absence of any “allegations that identify the ‘inflated fees’ or the specific
 13 misrepresentation about the amount Plaintiffs owed . . .” Feb. 7 ord. at 6. Plaintiffs’
 14 response was to make precisely the same conclusory allegations.

15 When the court dismissed Plaintiffs’ first complaint and granted leave to amend, it
 16 ordered them to “amend or delete the allegations that do not . . . describe a violation of
 17 law,” and stated that it would consider imposing sanctions via 28 U.S.C. § 1927 if
 18 Plaintiffs did not comply. Feb. 7 ord. at 12-13. Plaintiffs repeatedly ignored the court’s
 19 order, reasserting each of the claims above without either amending them or making new
 20 argument to defend them. In at least a few instances, Plaintiffs repeated their allegations
 21 verbatim, as if the February 7 order had never issued.² The court declines to consider
 22 § 1927 sanctions only because Defendants did not request them in their motion to
 23 dismiss.

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 25 ² The February 7 order noted that the complaint repeatedly “misname[d] Ms. Kaur and Mr.
 26 Singh.” The amended complaint continues to misname them, albeit less frequently. Amend.
 27 Compl. ¶¶ 3.8, IV.6 (referring to Plaintiffs as “the Rouses”). In the penultimate section of the
 28 opposition to the motion to dismiss, Plaintiff’s counsel again misnames her clients. Pltfs.’ Opp’n
 (Dkt. # 23) at 24 (discussing the misrepresentation claims of a “Mr. Gile” or “Mr. Giles”).

1 **B. Plaintiffs Cannot State Claims By Making Accusation of Wrongdoing Not
2 Tethered to a Cognizable Legal Theory.**

3 The amended complaint includes allegations that BofA violated a consent order
4 between it and a federal regulatory agency and that BofA violated Fannie Mae's loan
5 servicing guidelines. Plaintiffs did not attach the consent order to the complaint, but they
6 contend that BofA agreed to end dual tracking practices like those to which it subjected
7 Plaintiffs. The complaint does not purport to state a claim for violation of the consent
8 order. Plaintiffs purport to attach Fannie Mae's servicing guidelines to the complaint, but
9 they do not. Even so, they do not explain how they could state a cause of action based on
violation of another party's servicing guidelines.

10 **C. Plaintiffs Still Make No Plausible Allegation that Fannie Mae Was the Holder
11 of the Note During the Foreclosure Process.**

12 Plaintiffs attempted in their amended complaint to provide additional allegations
13 to support their allegation that Fannie Mae, not BofA, was the holder of their promissory
14 note during the foreclosure process. The court noted that even Defendants seemed
15 confused as to who held Plaintiffs' note, but explained that Plaintiffs had not plausibly
16 alleged that it was Fannie Mae. Feb. 7 ord. at 4-5.

17 Before considering whether Plaintiffs fare any better at plausibly alleging that
18 Fannie Mae held their note, the court explains why it potentially makes a difference. The
19 document that purportedly appointed ReconTrust as the trustee was a document from the
20 fall of 2010 in which BofA, purporting to be the "present beneficiary" of the deed of
trust, appointed ReconTrust as a successor trustee. If BofA was not the present
21 beneficiary (or the beneficiary's agent), it lacked authority to appoint a successor trustee,
22 in which case ReconTrust had no authority to foreclose on Plaintiffs' home. *See, e.g.,*
23 *Bavand v. OneWest Bank, FSB*, 309 P.3d 636, 649 (Wash. Ct. App. 2013) (reversing
24 order validating trustee's sale, concluding that "[w]ithout a proper beneficiary making the
25 appointment, [the trustee] was not vested with any of the powers of the original trustee
26 under th[e] deed of trust," and the purported trustee had "no authority . . . to conduct the
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1 nonjudicial foreclosure . . . and trustee's sale"). Moreover, if ReconTrust purported to act
2 as the trustee while knowing that it had no authority to do so, it is potentially liable to
3 Plaintiffs via both the Deed of Trust Act and the CPA. *See, e.g., Walker v. Quality Loan*
4 *Serv. Corp.*, 308 P.3d 716, 724, 727-28 (Wash. Ct. App. 2013) (reversing dismissal of
5 Deed of Trust Act claim and CPA claim where plaintiff alleged that purported trustee
6 conducted foreclosure proceedings when it knew or should have known it had no
7 authority to do so); *Bavand*, 309 P.3d at 652-53 (same). If BofA enabled that violation
8 either by purporting to appoint ReconTrust as trustee when it had no authority to do so, or
9 by controlling ReconTrust, then BofA may also be liable. *Walker*, 308 P.3d at 724
10 (considering whether Deed of Trust Act authorizes claim against purported beneficiary,
11 as opposed to purported trustee); *Bavand*, 309 P.3d at 651 (holding that non-beneficiary's
12 appointment of trustee is an unfair or deceptive practice under the CPA).

13 In this case, however, Plaintiffs offer no plausible allegation that BofA was not the
14 beneficiary (or authorized agent of the beneficiary) entitled to appoint ReconTrust as a
15 trustee. There is no dispute that BofA was the original beneficiary of the deed of trust, as
16 it was the original lender and secured party. Plaintiffs allege that at some point before
17 foreclosure proceedings began, BofA sold or transferred the note to Fannie Mae.
18 Plaintiffs make no allegation which, if proven, would constitute direct evidence of this
19 purported transfer. The allegations that do describe direct evidence suggest that BofA
20 was the beneficiary. For example, BofA transferred its beneficial interest in the deed of
21 trust to Fannie Mae *after* the foreclosure sale.

22 Instead of allegations akin to direct evidence, Plaintiffs rely on Fannie Mae's
23 guidelines for its loan servicers, alleging (to the extent that the court can understand the
24 allegations) that since BofA took some actions consistent with those guidelines, it must
25 have been a servicer, and not a beneficiary. These allegations are unavailing for two
26 reasons. First, the actions described in the guidelines are also consistent with the actions

1 that a beneficiary would take. Second, even if Plaintiffs were correct about the transfer
 2 of the note to Fannie Mae, the very guidelines Plaintiffs rely on describe a practice
 3 wherein Fannie Mae authorized its servicers to foreclose on homes, either as Fannie
 4 Mae's agent or (where necessary) as the holder³ of the note. A beneficiary is entitled to
 5 use agents, although it cannot authorize a third party to foreclose by simply ceding its
 6 authority over foreclosure decisions without exercising any control over that party. *See,*
 7 *Rucker v. NovaStar Mort., Inc.*, 311 P.3d 31, 38 (Wash. Ct. App. 2013) (finding no lawful
 8 agency where an agreement between beneficiary and servicer "appears to give unlimited
 9 power to [the servicer] to pursue foreclosure actions"). But there is no plausible assertion
 10 that this is what occurred in this case. No one could reasonably infer from the allegations
 11 of the amended complaint that BofA either was not the holder of the note or not the
 12 authorized agent of Fannie Mae. *See Butler v. OneWest Bank, FSB*, No. 11-18996MLB,
 13 Adv. No. 12-1209MLB, 2014 Bankr. LEXIS 3015, at *18-30 (W.D. Wash. Bankr. Jul. 9,
 14 2014) (examining relationship between servicer, note owner, and document custodian and
 15 concluding servicer lawfully acted as note owner's agent and as note holder).

16 **D. Plaintiffs Do Not Plausibly Allege an Injury Arising From Defendants' Dual
 17 Tracking.**

18 Finally, the court considers Plaintiffs' attempt to state a claim based on Bank of
 19 America's dual tracking. As the court noted in February, it is plausible to conclude that
 20 BofA engaged in unfair or deceptive conduct within the meaning of the CPA, or made
 21 false representations, when it told Plaintiffs that no one would foreclose until BofA made
 22 a decision about their loan modification. The problem, the court explained, was that
 23 there was no plausible allegation of injury arising from this wrongdoing.

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³ The court repeatedly uses the term "holder," because it is the holder of the note who has the
 25 authority to act as the beneficiary of the deed of trust. *See Trujillo v. NW Trustee Servs., Inc.*,
 26 326 P.3d 768, 773-74 (Wash. Ct. App. 2014) (distinguishing between "holder," "owner," and
 27 "beneficiary" as applied to the Deed of Trust Act). Plaintiffs often assert that Fannie Mae was
 the "owner" of their note, an assertion that does not address whether BofA was the note's
 beneficiary. *Id.* at 775 ("Ownership of the note is not dispositive.").

1 There are still no plausible allegations of injury arising from the dual tracking.
 2 The amended complaint adds a few allegations of injury, including “the cost of
 3 investigating [Plaintiffs’] claims after the foreclosure, the costs of defending the eviction
 4 proceeding, the costs associated with moving from the Property, and costs associated
 5 with attending meetings to investigate their claims and attending hearings.” Amend.
 6 Compl. ¶ 2.23. Where such costs arise from unlawful conduct, they can be injuries that
 7 satisfy the CPA. *E.g.*, *Walker*, 308 P.3d at 727 (holding that investigative expenses,
 8 travel expenses, and time off from work caused by attempted unlawful foreclosure were
 9 CPA injuries attributable to lender and trustee). But none of the injuries Plaintiffs
 10 complain of were caused by BofA’s dual tracking. Plaintiffs do not allege that if BofA
 11 had not made the false representations, they would have taken action to stop the trustee’s
 12 sale.⁴ They could not have done so, because they admit they were in default, and do not
 13 allege that they could have cured the default. Although they understandably complain
 14 that BofA’s misconduct filled them with false hope, Plaintiffs do not allege that they
 15 relied on BofA’s misrepresentations in any legally cognizable way.⁵ Although Plaintiffs
 16 hoped for a modified loan, there is no plausible allegation that anyone was required to

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 18 ⁴ Plaintiffs’ opposition to the motion to dismiss includes the bare assertion that if they “had been
 19 provided with truthful information about the foreclosure sale, they would have been able to take
 20 action to prevent it from occurring.” Pltf. Opp’n (Dkt. # 23) at 5. The amended complaint
 21 neither contains that allegation nor offers supporting allegations that make it plausible. The
 22 opposition also attaches a variety of documents that are nowhere mentioned in the amended
 23 complaint, and thus are beyond the scope of the court’s consideration on a motion to dismiss.
 24 The court has nonetheless reviewed the documents. They do not undermine the conclusions the
 25 court reaches today. Finally, Plaintiffs used the opposition to the motion to dismiss to state, for
 26 the first time, that the notice of trustee’s sale failed to identify the note holder and servicer in
 27 violation of RCW 61.24.030(8)(l) and that they have not seen the beneficiary declaration
 28 described in RCW 61.24.030(7). These claims come too late, and neither is cognizable. They
 29 allege no damages arising from noncompliance with RCW 61.24.030(8)(l), and RCW
 30 61.24.030(7) does not require a beneficiary declaration, much less that the trustee provide the
 31 declaration to a borrower.

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 33 ⁵ Plaintiffs reassert their allegations of emotional distress, but do not address the court’s prior
 34 observation that the CPA does not permit them to recover for emotional injuries. They do not
 35 argue that either a suit for misrepresentation or the Deed of Trust Act permits them to recover for
 36 a purely emotional injury.

offer them one. Plaintiffs admit that they knew within four days after the foreclosure sale that they would not receive a loan modification. Plaintiffs took no legal action until more than two years after the foreclosure sale. In short, the injuries to which they point are not the result of Defendants' false representations during the dual tracking process, they are the result of a trustee's sale and subsequent eviction that Plaintiffs have not plausibly challenged as unlawful.

For the same reason, Plaintiffs state no claim based on ReconTrust's ignoring their phone calls in the two days preceding the trustee's sale. That is misconduct, to be sure, and the court suggests no approval of the practice. But Plaintiffs do not offer plausible allegations of an injury caused by ReconTrust's misconduct. There is no plausible allegation that it would have made a difference if Plaintiffs had reached ReconTrust.

IV. CONCLUSION

For the reasons previously stated, the court GRANTS Defendants' motion to dismiss. Dkt. # 22. Plaintiffs did not request leave to amend their complaint again, and the court concludes that no amendment would remedy the deficiencies the court has identified in this order. The court accordingly DISMISSES this action with prejudice, and directs the clerk to enter judgment for Defendants.

DATED this 29th day of July, 2014.



The Honorable Richard A. Jones
United States District Court Judge